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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 719

CONVOY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANT OPPOSING MOTIONS TO AFFIRM

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Appellant files this, its brief, opposing motions to affirm, pursuant to Rule 16(3) of the Revised Rules of this Court.

STATEMENT

The statement of the case is set forth on pages 4 through 11 of appellant's Jurisdictional Statement,

and no material allegation therein contained is modified or refuted by the brief statements in the motions to affirm. Therefore, unnecessary repetition will be avoided.

Both the Government and the intervening appellee telescope the arguments of appellant into the framework of *Motor Convoy, Inc. v. U. S.*, 235 F.Supp. 250, affirmed per curiam, 85 S. Ct. 1575. They fail to meet the essential issues raised in appellant's Jurisdictional Statement. Like Linus, they wrap themselves into the comforting security of the Commission's decision in *National Automobile Transporters Association—Declaratory Order*, 91 M.C.C. 395 (NATA), while largely ignoring appellant's arguments attacking the Commission's policy adopted in NATA of issuing ex parte "modified" certificates of public convenience and necessity.

Nor do they consider matters not of record or discussed in *Motor Convoy*. These are: First, the eroding effect of subsequent orders of the Commission upon NATA, except that the Government contends (Motion, p. 6) that Ex Parte No. 230 does not involve the carriage of automobiles and that Ex Parte 230, Sub. No. 1, does not include multi-level rail-car service—conclusions hereafter shown to be untenable;[1] Second, the fact that the District Court in *Motor Convoy* specifically upheld the view that relevant testimony

[1]The Commission's decision in Ex Parte No. 230, 322 I.C.C. 301, was appealed on issues not relevant here, and the Court reversed the Commission as to said issues. *Atchison, Topeka and Santa Fe Ry. Co. v. U. S.*, 244 F.Supp. 955. Notice of appeal filed.

should be received and considered by the Commission —no such testimony was offered in *Motor Convoy*. Appellant described the nature of the evidence it would tender, but the Commission never gave it a chance to do so. This evidence was particularized and offered to the Court below as hereafter shown but it refused to rule on its admissibility and perfunctorily found it "not germane to any issue in this case." (J.S. Appendix A.)

ARGUMENT

1. THE MOTOR CONVOY CASE IS NOT CONTROLLING.

The ready willingness of the Government to have the Interstate Commerce Commission issue orders which are completely without evidentiary support and which violate all the principles of fair play, as exemplified in the Administrative Procedure Act the applicability of which was developed in the Jurisdictional Statement, now requires the attention of this Honorable Court.[2] The disaffection of many carriers with the orders of the said Commission under the so-called policy of NATA has been evidenced in a number of court proceedings and more will inevitably be initiated as a result of further pending cases before the Commission which will no doubt lead to the same ex parte procedure unless the Court, by granting a

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[2] *Riss & Co. v. United States*, 341 U.S. 907 (1951) holds that the Act applies to proceedings of the Commission. J.S., pp. 9, 15, 18.

hearing in this case, requires the Commission to accord due process to parties in the position of appellant.[3]

Appellant urges that a substantial question warranting the plenary consideration by this Court is presented in this case.

Appellant quoted (J.S., p. 12) from the District Court's opinion in *Motor Convoy,* including the statement:

> ". . . nor do we wish to set an unfortunate precedent for future applications wherein it might clearly appear that there is relevant testimony that should be considered by the Commission."

In the Jurisdictional Statement (pp. 12-14), appellant disclosed the considerable variance in the basic facts, so far as they were permitted to be elaborated, in this case as compared to *Motor Convoy.* In *Motor Convoy,* the Court stated that it failed to find in the record any statement as to the nature of the testimony

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[3]The procedure utilized by the Commission was to publish notice of the petition for "modified" certificate in the Federal Register which provided for participation by interested parties as follows:

> "Any person or persons desiring to participate in this proceeding may file *replies* to said petition (original and fourteen (14) copies each) within 45 days of the date of this publication in the Federal Register." (Emphasis supplied.) (F.R. Dec. 18, 1963, page 13825.)

With the filing of said replies, the Commission, refusing to grant an oral hearing and failing to establish any other method of developing a record, such as modified procedure, issued an order granting a modified certificate. Appellant's petition for reconsideration, including a renewed request for hearing was denied. All of the above-mentioned pleadings and order are a part of the record.

that the protesting carriers desired to introduce before the Commission nor did it find any resume of the same in the brief filed in the case (p. 261). In distinction to the situation there, here appellant at all stages before the Commission specifically requested an opportunity to be heard, described the nature of the evidence which it would present,[4] and, before the District

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[4]At pages 9 and 10 of Reply, Protest and Request for Oral Hearing, timely filed with the Commission, appellant said:

> "On further hearing [there was no hearing so word "further" is inadvertent] protestant Convoy would be prepared to show that it has been transporting for Chrysler Corporation into Oregon and Washington a substantially greater volume of traffic originating by rail in Michigan and that at least three terminals are required for that purpose. It is apparent, we believe, that the traffic which Commercial enjoyed prior to the rail diversion during the eighteen months shown could not have meant much to petitioner's predecessor, Western Auto Transport. The revenues are not shown, but compared to the gross of Western they could not have been very significant. Western Auto Transport was one of the largest of the automobile transporters and petitioner certainly now is.
>
> It would be grossly unfair to now permit petitioner, as a successor of a no longer existing carrier over three years after the operation terminated, to invade the field occupied by protestant Convoy Company and threaten to divert, not the amount of business which Western enjoyed, but the substantially greater volume which Convoy has been able to develop.
>
> In this regard Convoy is prepared to show that the Chrysler traffic into Oregon and Washington originates in California as well as Michigan. Convoy by reason of its ability to integrate traffic from numerous assembly plants through its railhead terminals can maintain a relatively steady volume of traffic moving to dealers expeditiously and efficiently. To fragmentize the business by permitting each initial hauler to perform secondary service from numerous railheads for single manufacturers would be to so thin out the traffic as to make the whole distribution system unsound and unprofitable."

In its Petition for Rehearing and Reconsideration, on page 4, timely filed with the Commission, appellant renewed its request for an oral hearing so that it could offer testimony as set forth in its Reply. The said Petition is also a part of the record.

Court offered evidence, summarized in the Jurisdictional Statement, in footnote 1, pp. 6 and 7.[5]

The motions to affirm fail to consider, to discuss, or to refute the evidence offered by appellant and the arguments it has made with respect thereto,[6] but have preferred, for obvious reasons, to synthesize the whole controversy into the simple proposition that since the Commission's "modification" of Commercial Carriers certificate merely permitted it to continue for part of the journey what it formerly did for the entire route, no hearing or submission of evidence through the Commission's modified procedures was required. The matter is just not that uncomplicated. As appellant showed in the Jurisdictional Statement, footnote, page 7, and in the statement of the case, page 9, Commercial Carriers during many months of the past transported none or only an inconsequential part of the

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[5]The Government contends (Motion, footnote 2, p. 4) that the verified statements filed by Commercial Carriers were not disputed by appellant. However, in said footnote 1, appellant set forth the figures revealed in Appendix A of said verified statement and showed that it disclosed inconsequential traffic, and that during many months of the summer when traffic should have been heavy no vehicles were transported at all by Commercial Carriers; thus, appellant did challenge the conclusion of the Commission that Commercial Carriers qualified under the policy of NATA, assuming that policy was valid. Neither motion deals with this issue as to qualification which, reduced to an absurdity, if the Commission is to be upheld, would result in a carrier being authorized to engage in transportation within a particular territory if it had prior to the NATA decision transported one vehicle into that area.

[6]The Government merely says it would have been improper for the District Court to consider such evidence. (Government Motion, p. 6, footnote 3.) Intervening appellee contends that it has not been established that appellant would have produced any factual evidence beyond that considered by the Commission. Further, that the allegations of fact were admitted by Commercial Carriers. (Intervening Appellee's Motion, page 6.)

Chrysler traffic which is involved. Appellant, on the other hand, during past periods did transport and is now transporting the Chrysler traffic, and invested substantial sums in terminals and equipment for the handling of such traffic.[7]

Furthermore, the accumulative effects of grants of such authority based upon the policy enunciated in NATA and without any evidence of public convenience and necessity as required by Section 207 of the Interstate Commerce Act, now support appellant's contention that when opportunity to present evidence is foreclosed, due process is eliminated and arbitrary action results. Existence of other court proceedings involving this same issue shows that other carriers in the position of appellant have also suffered from lack of due process. Continuation of this policy by the Commission will seriously jeopardize the operations of numerous carriers and disrupt the automobile hauling field.[8] Thus, appellant respectfully invokes the attention of this Court.

Despite the conclusions contained in the motions (Intervenor, p. 8; Government, pp. 4 and 5) that, in effect, no new grant of authority or change in com-

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[7]Exhibits 1, 6, 8, and 11 provide information substantiating these conclusions. Thus, Convoy's investment at Portland, Oregon, is almost $2,000,000.00. In 1963 and 1964 it delivered 16,000 Chrysler vehicles in Oregon through Portland, compared with 1553 by Western in a 26-month period. All exhibits mentioned in this brief refer to those offered to the District Court.

[8]Counsel for intervening appellee Commercial Carriers at the hearing before the three-judge District Court stated:

> "Likewise, I have on my desk additional petitions to file. There has been some delay. I think the volume of petitions are starting to come in to the Commission now. They are coming in." (Official Transcript, p. 59.)

petitive position is involved in the Commission's decision, the fact is that by virtue of that decision Commercial Carriers is permitted to intrude into an area of operation within which it had distributed little traffic before and with respect to which it would perform an entirely different service than previously, and thereby threaten to impair the operation of appellant.

The Commission itself, however, as appellant offered to prove before the District Court, has on occasion not granted modified certificates to carriers hauling more traffic than was revealed by Commercial Carriers. For example, Exhibit 6 shows that Robertson Truck-A-Ways, Inc. hauled 2,346 Chrysler vehicles to Oregon, compared to 363 by Commercial, for the same period, yet the Robertson petition[9] was denied and the Commercial petition granted. Such is the result of arbitrarily determining cases without an opportunity to the parties to be heard or submit evidence.[10]

By reason of the matters set forth above, appellant urges that *Motor Convoy* was not a holding by this Court or, in fact, by the District Court, that the Commission may, under the circumstances of this case, dispense with an oral hearing or acceptable equivalent. It has here been shown that the simple legal principle urged by the Government and intervening appellee cannot be applied in a vacuum but must be considered

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[9]The Robertson record is Exhibit 12.

[10]In the order and judgment (J.S., Appendix A), the District Court stated that it was not determining the admissibility of the evidence offered by appellant to the Court. It is clear that the District Court had a right to receive it and to give it more than the perfunctory consideration which the judgment indicates. See Section 2c of Argument, pp. 14-15.

in relation to the history of the development of the policy relied on, the facts of record of this case, and those revealed by the exhibits offered to the District Court.

It is argued further than when this broader treatment is accorded, then the principles to be applied are those which were urged in the Jurisdictional Statement.

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2. IN LIGHT OF THE FACTS, PERTINENT LEGAL PRINCIPLES WARRANT THE INTERVENTION OF THIS COURT.

a. Other Commission Orders and Decisions Invalidate NATA.

The Government and intervening appellee urge that *Motor Convoy* upheld the policy enunciated in NATA that a mere showing of past operations proved public convenience and necessity and warranted the issuance of "modified" certificates by the Commission. Appellant has shown the negligible volume of the prior hauling by Commercial Carriers which constitutes the only supporting record before the Commission other than a letter from an official of Chrysler Corporation stating that it felt that Commercial Carriers should be entitled to compete.[11] No party herein has considered that letter of any importance, since obviously it did not provide any showing of public convenience and necessity, and did not assert that existing service was in any way inadequate.

Appellant urges that the NATA policy, unless fortified by an appropriate record, cannot in itself be the basis for a grant of a certificate of public convenience

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[11] Appendix B to Commercial Carriers Petition for Modification.

and necessity. The Commission had in 1953 rejected the follow-the-traffic principle in the leading case of *Smith & Solomon Trucking Co.,* 61 M.C.C. 748, and was upheld on appeal. (J.S., pp. 15-18.) The motion of the Government (p. 5) attempts to disparage that case by contending that it applied to new certificates as distinguished from "modified" certificates. Appellant contends that a reading of that decision in the light of the arguments advanced by the parties in this case will clearly sustain the position of appellant that the "distinction" is one without a difference.

The motions, in resting on NATA, ignore the prophetic dissenting opinion therein of then Chairman Murphy of the Commission, with whom Commissioner Tuggle joined, in which it was pointed out that Ex Parte No. 230 was pending for the purpose of determining rules and regulations pertinent to the entire substituted service field. It was stated:

> "Thus, in my opinion, the decision here is unnecessary, premature, and a prejudgment of the issues proposed in the general investigation.—At the least, these rulings serve to inhibit our freedom of action in the general investigation, but, of even greater importance is the fact that they may well mislead the industry as to the course we will take in that proceeding." (p. 419.)

In conclusion, Chairman Murphy urged:

> "Rather I believe that their [the parties in the proceeding] interests would be served best by awaiting the final and informed judgment of this Commission on these issues in the general investigation." (p. 419.)

Not only did the Commission in Ex Parte No. 230 come to certain conclusions conflicting with those in NATA, as it conceded, but it established a new proceeding, Ex Parte No. 230, Sub No. 1, for the purpose of considering automobile transporting separately in the realm of substituted service. (J.S., pp. 8 and 9.) That proceeding has never been set for hearing by the Commission, therefore, the rules of automobile transporting are still in limbo. Yet, the Commission is giving effect to a policy which, in itself, is insufficient to award certificates, and is further impaired by the fact that it is not even a final policy.

The only responses of the Government (p. 6) are, first, that Ex Parte No. 230 did not embrace automobile transporting, which is obviously incorrect since Commissioner Murphy's dissent clearly shows that it did; and, second, that "Ex Parte No. 230, Sub No. 1, is specifically limited to TOFC service and at issue here is MLRC service." The Government is in error again. All the plans developed by the Commission with respect to substituted service are referred to as TOFC plans, meaning "trailer-on-flat-car". In the NATA proceeding it became necessary to determine whether TOFC would include MLRC, meaning "multi-level rail car" movements. At pages 411 and 412 of NATA, this question was discussed and the Commission clearly concluded that MLRC was, in effect, a part of TOFC. In its findings at page 417, the Commission specifically held that the use of TOFC, Plan I, could be utilized under the conditions set forth by the automobile transporters. There is no question but TOFC

as there used includes MLRC in accordance with the conclusion at page 412. The notice of hearing in Ex Parte No. 230, Sub 1, itself clearly discloses that the Government is in error on both points. It shows that Ex Parte No. 230, was intended to cover the full scope of coordinated and substituted motor-rail service, including automobile transporting, and that MLRC is included in Ex Parte 230, Sub 1, for it says, in part:

> *"It appearing,* That notice of proposed rule making was given by the entire Commission by order of June 29, 1962, and served July 2, 1962, in Ex Parte No. 230 (27 F. R. 6434) respecting the practices of, and the manner and methods of the performance and use of coordinated and substituted motor-rail service, as particularly described in that order, and all similar and related types of service, *including, but not limited to, so-called 'piggyback' service,* of all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce;"
>
> *"It is ordered, That the portion of Ex Parte No. 230 embracing the transportation of motor vehicles by authorized motor carriers,* be, and it is hereby, reopened for oral hearing at a time and place to be hereafter fixed and assigned Ex Parte No. 230 (Sub-No. 1) and entitled as set forth in the caption under (Sub-No. 1);" (Italics supplied). (49 CFR Ch. 1, Published in Federal Register, November 10, 1963, at page 12227.)

The position of the Government would lead to the ridiculous conclusion that the Commission is to hold an investigation concerning substituted service only when trailers are loaded on flat cars, ignoring the

MLRC service which now embraces the vast majority of all of the coordinated movements in the transportation of motor vehicles.

b. Citations of Intervening Appellee Distinguished.

Intervening appellee argues that the Commission does not have to hold a hearing in determining the statutory criteria to be met before a certificate of public convenience and necessity can be issued. (Motion, pp. 5 through 8). It is argued (p. 5) that this Court has given recognition to the discretionary power of the Commission to establish procedural criteria, citing *United States v. Pierce Auto Freight Lines,* 327 U.S. 515, and *Interstate Commerce Commission v. Parker,* 326 U.S. 60. The fact is that both proceedings involved extensive hearings before the Interstate Commerce Commission and the issues with which the Court was there concerned have no pertinency, which appellant can discover, to the case here.

Intervening appellee also cites (Motion, p. 6) *United States v. Storer Broadcasting Co.,* 351 U.S. 192, holding (p. 205) that an oral hearing is unnecessary where all of the evidentiary facts upon which the issues can be determined are capable of presentation in the pleadings. The *Storer* case is unique in that the Federal Communications Commission there had established a general rule limiting the number of stations in which an applicant could have an interest and when it applied to operate a station above that number, the policy of the Commission precluded the granting of the application. Storer could not bring itself within

the general policy, therefore, the Commission concluded there was no purpose in having a hearing. That is a far cry from the situation here where the policy adopted is not *prohibitory* affecting only the applicant itself. Here we are faced with an affirmative policy pursuant to which certificates are granted ex parte in violation of the statute requiring proof of public convenience and necessity.

Intervening appellee argues (Motion, p. 6) that there is no issue of fact here. This completely ignores all of the offers of evidence which were made by appellant. No hearing was held by the Commission nor was modified procedure invoked by it. (J.S., p. 11.) Thus, appellant was not even permitted to offer verified statements under the modified procedure provided for in the General Rules of Practice of the Commission. The Commission determined the whole case upon the basis of the bare petition and the reply of appellant. Appellant requested an opportunity to be heard, but was foreclosed from presenting the evidence it told the Commission it had for presentation. It presented that evidence to the District Court without avail. This is the crux of the whole controversy and the whole basis of the distinction of *Motor Convoy* wherein no evidence was offered by the complaining motor carriers, according to the Court, either before it or the Commission.

c. The District Court Erred in Not Considering Evidence Offered to It.

The Court below should have received and given consideration to the evidence offered by appellant. It

was not limited to the record before the Commission. The principle has well been stated, as follows:

> "However, the general rule limiting review to the record made before the agency is not always observed and is not without its exceptions. The absence of essential findings of fact or sufficient information to disclose the basis for the agency's action, or the presence of a constitutional or jurisdictional fact question, or the fact that the evidence was not capable of being introduced below, *or that the determination was made ex parte,* may require the courts to permit the admission of evidence which was not before the agency." (Emphasis supplied). 2 Am. Jur. 2d 595.

d. Hearing or Equivalent Is Required.

Appellant, in its Jurisdictional Statement, page 14, cited *First National Bank of Smithfield v. First National Bank of ENC,* 232 F.Supp. 725 (1964) in which the controller of currency approved a new bank license without a hearing, contrary to the usual practice. The Court relied on the Administrative Procedure Act and procedural due process in holding that fairness and regularity require the development of a record, and where there is no hearing, no findings of fact, and no development of the evidence by way of a record, the Court cannot determine if the holding is arbitrary. The controller argued that to be required to hold a hearing would be an undue burden. The Court rejected this contention.

In the strong dissent of Judge Luther Bohanon in *United Transports, Inc., and Auto Convoy Co. v. United States,* 245 F.Supp. 561 (J.S., p. 14) he clearly

denoted the need for review by this Court so that the requirements of the Fifth Amendment and the Administrative Procedure Act could be fulfilled. That case is now on appeal to this Court. Thus, it is apparent that at least one judge of the District Court is concerned about the lack of fair dealing in these decisions issued under the NATA policy.

CONCLUSION

The Commission, in the matter complained of, issued a new grant of extended authority to a competitor of appellant on the basis of the policy adopted in NATA. The record consists of the bare petition of the applicant itself and the reply of appellant. All requests of appellant for hearing and for an opportunity to introduce described evidence were rejected. Appellant renewed the offer to introduce evidence and prepared exhibits of that evidence which were tendered to the District Court. However, the District Court, on the same day as the argument was heard, issued its order and decision dismissing appellant's complaint, citing *Motor Convoy,* and for good measure it asserted that there was substantial evidence to support the Commission's decision—obviously, an insupportable conclusion. It further arbitrarily gave but cursory consideration to the evidence offered by appellant and did not receive it. It is clear that the District Court rested entirely upon *Motor Convoy.* Unless relief is granted by this Court, appellant will have inflicted upon it an important competitor without any proof of public convenience and necessity, and many additional

"modified" certificates will be issued by the Commission without observance of procedural due process which will lead to further actions in the Federal Courts for relief. As has been shown, at least one District Judge is highly disturbed by this form of arbitrary action and has written a vigorous dissenting opinion which appellant respectfully urges be considered by this Court.

The *Motor Convoy* case involved substantial equities which were apparent in favor of the applicant there. The result is, that in cases such as this, where the equities are all with the carrier in the position of appellant, the same wide broom is used to sweep them aside, without any proceeding being made available for the submission of evidence contrary to the consistent practice of the Commission.

This Court should deny the motions to affirm, should note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the Court below.

Wherefore, appellant so prays.

Dated, December 20, 1965.

Respectfully submitted,

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